UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 0 4 2014

OFFICE OF
GENERAL COUNSEL

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Mr. Colin Enssle
Senior Manager
GE Water & Process Technologies
1299 Pennsylvania Avenue, NW
Washington, DC 20004

Re: Freedom of Information Act HQ-APP-2013-000391, Final Determination Concerning Confidentiality

Dear Mr. Enssle:

General Electric ("GE"), Water & Process Technologies, has asserted a claim of confidentiality for certain information that is responsive to the above-referenced Freedom of Information Act ("FOIA") request to the United States Environmental Protection Agency ("EPA" or "Agency"). This information includes:

(1) *Category 1 Records – Cost and operational information*
- GE Zero Liquid Discharge (ZLD) systems
  - Capital and operating cost estimates
- Advanced Biological Metals Removal ("ABMet®") systems
  - Equipment capital cost equations and graphs
  - Installation capital cost equations and graphs
  - Nutrient dosages and costs
  - Design basis for cost equations
  - Estimated backwash water volumes
  - Estimated solids generation rate and composition

(2) *Category 2 Records – BAT treatment technologies for flue gas desulfurization ("FGD") wastewater*
- ABMet systems
  - Performance data, including FGD and non-FGD pilot data
- GE organosulfide – Metclear™ MR2405 metals precipitant technology
  - Laboratory and field data and information for evaluation of FGD wastewater treatment
  - Operational data on system equipment at wastewater source sites
  - Technical, laboratory-based responses to questions on mercury loading

On June 30 and July 21, 2014, the EPA requested that GE substantiate your claim of confidentiality ("request for substantiation"). GE requested an extension on July 16, 2014, to which the EPA granted you a twenty business day extension on July 21, 2014. On August 15, 2014, GE submitted two substantiation responses to EPA's request ("substantiations").

I have carefully considered your claim. For the reasons stated below, I find that the information claimed as confidential is entitled to confidential treatment.

DISCUSSION

Exemption 4 of the FOIA exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). In order for information to meet the requirements of Exemption 4, EPA must find that the information is either (1) a trade secret; or (2) commercial or financial information obtained from a person and privileged or confidential (commonly referred to as "Confidential Business Information" ("CBI")).

A. Initial Considerations

EPA's regulations at 40 C.F.R. § 2.208 state that, in order for business information to be entitled to confidential treatment, the Agency must have determined that, inter alia:

> (1) The business has asserted a claim of confidentiality and that claim has not expired, been waived, or been withdrawn;
> (2) The business has shown that it has taken reasonable measures to protect the confidentiality of the information, and that it intends to continue to take such measures;
> (3) The information is not, and has not been, reasonably obtainable by a third party without the business' consent through legitimate means; and
> (4) No statute specifically requires disclosure of the information.

In your substantiation, GE stated that it sought confidential treatment for the above-referenced information indefinitely, that it has taken reasonable measures to protect the information, that no interceding events have negated its CBI claim, and that the information has not become stale. In its analysis of this matter, the EPA has not found any reason to doubt these assertions by GE. As a result, I will determine whether or not the information meets the definition of trade secret or CBI.

B. Trade Secret

The definition of "trade secret" under the FOIA is limited to "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either

innovation or substantial effort." Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983). This definition requires that there be a "direct relationship" between the information and the production process. Id.

You claim that the information constitutes a trade secret because by the definition of the Trade Secrets Act, 18 U.S.C. § 1905, all of the claimed CBI "comes within the definition of and is considered by us as a trade secret." See GE Substantiations at 5. However, for the purpose of assessing whether the information is a trade secret, you failed to explain how EPA's release of the information would identify performance information or capital and operating cost estimates would reveal a plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort. It is not enough to state simply that the information falls within the definition of "trade secret" without a specific explanation of how this would be achieved and without discussing how disclosure of the information identifies or reveals a trade secret. You have not demonstrated how GE's process could be ascertained if the information were disclosed. The Agency has no other indication that the information meets the definition of a trade secret. Without GE specifically addressing these issues, it is impossible for the EPA to assess whether there is a direct relationship between the claimed trade secret and your production process.

You have not demonstrated that the information would allow the identification of a secret, commercially valuable plan, formula, process, or device used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort. Consequently, I find that the information is not a trade secret.

C. Confidential Business Information

If the information does not reveal a trade secret, it may still be exempt from release under Exemption 4 of the FOIA if it is CBI, i.e., "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The terms "commercial" or "financial," for purposes of Exemption 4 of the FOIA, "should be given their ordinary meanings." Public Citizen, 704 F.2d at 1290 (citing Washington Post Co. v. HHS, 690 F.2d 252, 266 (D.C. Cir. 1982)). The information at issue relates to a business, thereby meeting the ordinary definition of "commercial." Since GE meets the definition of the term "person," as defined by EPA's regulations at 40 C.F.R. § 2.201(a), the information was "obtained from a person" as required by Exemption 4 of the FOIA.

In order to qualify as CBI, the information must be "privileged or confidential." You have claimed this information to be confidential, but you have not claimed this information to be privileged. The Agency has no indication that the information is subject to a common-law privilege and will therefore limit its discussion to the issue of confidentiality. Courts have established two distinct standards to be used in determining whether commercial or financial information submitted to an agency is "confidential" under Exemption 4. The two standards

are based on how the information was submitted to the agency—whether the submission was voluntary or required by the agency. Information submitted to the Government on a voluntary basis "is 'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993). Information that is required to be submitted to the Government is confidential if its "disclosure would be likely either '(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.'" Critical Mass, 975 F.2d at 878 (quoting National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted).

1. Voluntary Submission

In your substantiation, you claimed that the information was submitted voluntarily to the Agency. Under EPA's regulations at 40 C.F.R. § 2.201(i), voluntarily submitted information consists of business information the submission of which EPA had no statutory or contractual authority to require, as well as business information the submission of which was not prescribed by statute or regulation as a condition of obtaining some benefit (or avoiding some disadvantage) under a regulatory program of general applicability. For a submission to be mandatory, a law must affirmatively require the submission of information or give the Agency authority to require the submission of information. Only actual legal authority – not the requester's intent or the submitter's belief – is to be considered in determining whether a submission is required or voluntary. Center for Auto Safety v. NHTSA, 244 F.3d 144, 149 (D.C. Cir. 2001). The Agency must not merely possess authority to require submission; it must also exercise its authority. The decision to exercise this authority is entirely within the discretion of the Agency. Critical Mass, 975 F.2d at 880; Parker v. Bureau of Land Management, 141 F. Supp. 2d 71, 78 n.6 (D.D.C. 2001).

In this case, the Agency did not exercise its authority to require the submission of the information. Nor was the submission of the information a condition of obtaining some benefit or avoiding some disadvantage under an EPA regulatory program. GE voluntarily provided this information to the EPA in order to assist the Agency to assist the EPA in its rulemaking efforts. This information was not collected under the authority of Section 308 of the Clean Water Act (Federal Water Pollution Control Act, 33 U.S.C. § 1318), and because it was a vendor and not a steam electric generation facility, GE was not required to respond to the May 20, 2010 Steam Electric Questionnaire. Therefore, I conclude that the GE submitted the information to the EPA voluntarily.

2. Not Customarily Disclosed

Information that is voluntarily submitted to the EPA must be withheld under Exemption 4 of the FOIA if "it is of a kind that would customarily not be released to the public." Critical Mass, 975 F.2d at 879. The Agency's review must be objective and "must meet the burden of

proving the provider's custom." Id. Courts have not articulated a clear standard for whether information has been customarily disclosed to the public, but they do offer guidance. Information that has been previously disclosed may nonetheless receive Exemption 4 protection as long as the submitter has not made the kind of information being claimed as CBI available to the general public. Center for Auto Safety, 244 F.3d at 151-53.

GE claims that the information is neither customarily disclosed nor available to the general public. Specifically, you have indicated that GE had clearly marked each document or designated specific information that should remain confidential. In addition, GE took all available steps to protect its claimed CBI, including requiring all customers with access to laboratory, pilot, field, performance process formation, cost and operational information to be subject to Non-Disclosure Agreements ("NDA") or to confidentiality provisions outlined in every bid proposal. Also, NDAs require that all information relating to product offerings, sample materials, technology, sales, marketing and distribution activities, business plans, relationships, and other matters contained in bids remain confidential. GE further explained that its internal procedures require that confidential information are not to be shared with any third parties without written, enforceable obligations of confidentiality. In its analysis of this matter, the EPA has not found any reason to doubt these assertions by GE. Therefore, I find that the GE has not customarily disclosed the information.

Furthermore, because GE voluntarily provided these categories of information to the EPA to support its rulemaking effort to revise the effluent limitations guidelines and standards for the steam electric power generating industry, any disclosure would lessen, if not eliminate, the future availability of GE information in the future.

Conclusion

For the reasons outlined above, I find that the information is entitled to confidential treatment. Therefore, this information must be withheld under Exemption 4 of the FOIA. Should you have any questions concerning this matter, please call Quoc Nguyen at (202) 564-6343.

Sincerely,

Kevin Miller
Assistant General Counsel
General Law Office

cc: Robert Wood, Director, Engineering & Analysis Division, Office of Water
Jezebele Alicea, Environmental Engineer, Engineering & Analysis Division, Office of Water